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U.S. COURT OF APPEALS

MAY 10 2017

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED _____
DOCKETED _____
DATE _____ INITIAL _____

COLETTA KIM BENELI,)	CASE NO. 15-73426
)	Scheduled for Oral Argument
Petitioner,)	May 15, 2017
)	
v.)	
)	
NATIONAL LABOR)	<u>PETITIONER'S LETTER TO</u>
RELATIONS BOARD,)	<u>THE COURT PROVIDING</u>
)	<u>SUPPLEMENTAL AUTHORITY</u>
Respondent,)	
)	
BABCOCK & WILCOX)	
CONSTRUCTION CO., INC.,)	
)	
Respondent-Intervenor)	

Pursuant to the Federal Rules of Appellate Procedure, Rule 28(j), Petitioner Coletta Kim Beneli, through undersigned counsel, provides the following supplemental citation: *National Labor Relations Board v. Pier Sixty, LLC*, Case No. 15-1841-ag(L) (Second Cir., April 21, 2017). This case was decided after the close of briefing in this case on November 28, 2016.

This decision addresses the issue at page 13 of Petitioner's Reply Brief of whether Beneli's termination for "profanity" constituted disparate treatment in support of an underlying retaliatory motive and, specifically, whether Beneli's language was so opprobrious as to deny her the protections of the Act.

In *Pier Sixty*, the court reviews the development of NLRB doctrine regarding this latter question beginning with the four-part *Atlantic Steel* test providing that whether "the uttering of ... obscenities" operates to deprive a worker of the protections of the Act depends on the place of the discussion, the subject matter of the discussion, the nature of the employee's outburst and whether the outburst was provoked by the employer's unfair labor practice. (Pages 15-16 of slip opinion.) In

addition, the court discussed new General Counsel's Office guidance that "the totality of the circumstances," based on substantive evidence, must show that an employee's conduct "was... so egregious as to exceed the Act's protection." (Page 18.) Applying an amalgam of those tests, the court held that online language much stronger than Beneli's was insufficient to deprive the employee of the Act's protections. (Pages 19-22.)

Although not yet published, this case is available online at:
<http://caselaw.findlaw.com/us-2nd-circuit/1857799.html>

Respectfully submitted,

/s/ Myron L. Scott
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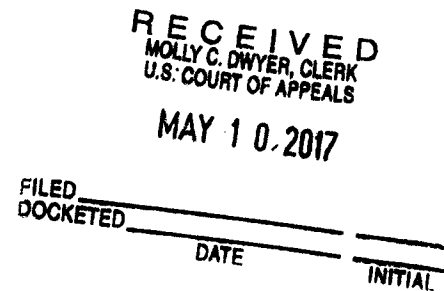
(480)968-2179

Counsel has been exempted from electronic filing requirements. The I have provided a copy of this letter to each party's counsel by first class mail on this date.

A handwritten signature in black ink, appearing to read "Myron L. Scott", with a stylized flourish at the end.

Myron L. Scott

US Court of Appeals for the Ninth Circuit
Clerk of the Court
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Enclosed is the original and three (3) copies of Petitioner's Letter of Supplemental Authority. I am exempted from electronic filing and have provided copies of this letter by first class mail and email to all parties as follows:

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A handwritten signature in black ink, appearing to read "Molly C. Dwyer".